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In The

Supreme Court of the United States

October Term, 1995

NATIONAL ASSOCIATION OF REVIEW APPRAISERS AND MORTGAGE UNDERWRITERS, INC., *et al.*,

Petitioners,

vs.

THE APPRAISAL FOUNDATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit Court of Appeals applied the appropriate standard — the rule of reason — to Petitioners' claim that their exclusion from the Foundation was anticompetitive where the Foundation's sponsorship criteria were deemed by the Eighth Circuit as facially valid?

2. Whether the Eighth Circuit Court of Appeals properly applied the relevant standard of causation to Petitioners' antitrust claim to conclude that, because of significant other factors causing Petitioners' alleged injury, Petitioners could not establish that their exclusion from Foundation sponsorship was a material cause of their claimed injury?

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I

STATEMENT OF THE CASE

A. The Parties

NARA/MU and NAREA (collectively "Petitioners") are appraisal trade associations located in Scottsdale, Arizona, and are owned and/or controlled by Robert Johnson. NARA/MU purports to be operated as a Minnesota non-profit, tax-exempt association; Robert Johnson serves as its executive director. NAREA is a Minnesota for-profit corporation solely owned by Robert Johnson.

Three of the respondents — the Appraisal Institute, the American Society of Appraisers, and the National Society of Real Estate Appraisers — are also appraisal trade associations.[1] All are non-profit, tax-exempt membership associations that provide a variety of services to their appraiser members, including publishing educational materials and conducting educational courses for appraiser professionals. Additionally, each association awards professional designations to members who satisfy certain educational and experiential criteria.

The fourth respondent, the Appraisal Foundation ("Foundation"), is a non-profit, tax-exempt corporation which was formed by eight appraisal trade associations in November 1987 to develop and promote uniform appraisal standards and appraiser qualifications through its two independent boards, the Appraiser Standards Board ("ASB") and the Appraiser Qualifications Board ("AQB"). In 1989, Congress passed Title 11 of the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") which expressly charged

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1. There are additional respondents involved in this litigation. Two of those additional respondents, the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers are the predecessor organizations to the Appraisal Institute. The individual respondents, Roy X. Morris, Roy G. Green, George Hamilton Jones, and Joseph S. Durant have served as trustees of the Appraisal Foundation.

the Foundation with the responsibility for establishing, through the ASB and AQB, minimum appraisal standards and appraiser qualifications for application to federally-related transactions.

B. Petitioners' Application For Foundation Membership

In January 1992, the Foundation revised its by-laws to create the current categories of membership or "sponsorship." The revised bylaws established three different types of sponsorship: appraisal sponsors; affiliate sponsors; and corporate sponsors. The appraisal sponsors category is intended for appraisal trade associations; however, the two other categories of sponsorship are also open to appraisal trade associations. To qualify as an appraisal sponsor, an association must: be non-profit; be able to pay dues; award appraisal designations to some, but not all, members (meaning designations must be earned by satisfying meaningful educational and experiential criteria); require its appraisal designated members to achieve minimum AQB requirements in the areas of education, experience, examination and continuing education; and adopt the uniform standards of professional appraisal practice ("USPAP"), establish a method to teach and enforce USPAP, and require continuing education course work on the USPAP every five years.

Although NARA/MU and NAREA opposed the formation of the Foundation and its role under FIRREA and declined to participate in the many Foundation activities open to nonsponsors, the Petitioners nonetheless sought appraisal sponsorship status. After reviewing relevant information about the Petitioners, the Foundation determined that, for a variety of reasons, Petitioners did not appear to meet the criteria for appraisal sponsorship. Upon reaching this conclusion, the Foundation informed Petitioners that it had specific concerns about their designation practices, their education and examination requirements, their promotion and enforcement of

the USPAP, their enforcement of continuing education requirements, and their non-profit status.

With regard to the non-profit issue, the Foundation uncovered evidence that both Petitioner associations have funneled millions of dollars directly to Robert Johnson through payment of management fees, rent, and other perks. Both NARA/MU and NAREA are managed by International Association Managers, Inc. ("IAM"), a for-profit corporation whose sole shareholder, officer, and director is Robert Johnson. IAM has no written management contracts with any of the associations it manages, including NARA/MU and NAREA. Johnson maintains that there is an understanding with the associations that IAM will provide management services but has no idea how he determines the management fees charged to NARA/MU or NAREA. Johnson also has no idea how the compensation paid to him by IAM (ranging from $200,000 - $450,000 in the years 1989 through 1991) was determined.

Johnson personally owns the building from which NARA/MU, NAREA, and several other associations operate. Although IAM pays rent to Johnson that is charged back to the associations, Johnson could not explain how the rent charged to the associations, through IAM, was set and there is no written lease evidencing any understanding on this issue. The Foundation gleaned from this information that Johnson's dealings with Petitioners are something less than "arms-length" and, instead, seem to evidence Johnson's complete control of the associations and their finances.

Additional evidence of Johnson's control over these associations was exposed by an investigation by the Federal Elections Commission of Johnson's campaign contributions to the 1988 presidential campaign. This investigation resulted in a June 1993 guilty plea by Johnson to one count of perjury and one count of making illegal campaign contributions through his

NAREA association. The Foundation concluded that this information called into question NAREA's independence and NARA/MU's purported non-profit status.

Additionally, publicly-available court records indicated that the Petitioner associations, instead of reviewing and monitoring the qualifications of potential members and the recipients of its professional designations, were granting membership and, more importantly, conferring professional appraisal designations indiscriminately. For example, in 1989, NAREA brought a lawsuit for defamation, among other claims, against an appraiser, Roy C. Schaeffer, when Schaeffer publicly characterized NAREA as a "diploma mill" after NAREA awarded a professional designation to Schaeffer's cat, Tobias. Because NAREA did not verify the credentials of the applicant, it failed to determine that Tobias Schaeffer was not a qualified real estate appraiser, but was instead a cat. The court dismissed NAREA's defamation suit, finding Roy Schaeffer's characterization of NAREA as a diploma mill to be true.

Finally, there was evidence that the Petitioner associations had not adopted the USPAP and, consequently, were not providing education on the uniform standards, both of which are required for membership in the Foundation. Robert Johnson testified, for example, that he was not sure whether it is appropriate to have national uniform standards of appraisal practice and "didn't know" of an education mechanism for teaching the standards. Based on the Petitioners' failure to meet virtually all the Foundation's sponsorship criteria, the Foundation declined to permit them to participate in the Foundation as an appraisal sponsor.[2]

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2. Although Petitioners were informed about other avenues of participation in the Foundation open to them, Petitioners chose not to pursue them.

C. The Antitrust Litigation

In response to the Foundation's refusal to admit Petitioners as appraisal sponsors, NARA/MU filed an antitrust action against the Foundation and its sponsors alleging a violation of Sherman Act Sections 1 and 2. In this suit, NARA/MU claims that it meets all sponsorship criteria and that its exclusion from the Foundation has effectively crippled NARA/MU's ability to compete with other appraiser associations that are Foundation sponsors. The Foundation then brought a declaratory judgment action against NAREA seeking to establish that the Foundation had not violated the antitrust laws for likewise declining to grant that association sponsorship status. NAREA counterclaimed, asserting claims similar to those asserted by NARA/MU.

In their complaint and counterclaim, the Petitioners assert that they have suffered antitrust injury in the form of a decline in membership solely as a result of the Foundation's allegedly anticompetitive acts. Petitioners have, however, blamed these same membership losses on other defendants in other lawsuits.

For instance, in an affidavit submitted in conjunction with the previously-described Schaeffer "cat case," Ken Twichell, NAREA's then managing director, delineated the injury NAREA had suffered due to the incident. In his affidavit, Twichell stated that:

> NAREA knew that its membership renewal rate had suffered dramatically in the wake of defendant's comments [about being a diploma mill]. . . . I believe these comments to be the predominant cause of our lost members. In the years immediately prior to 1987, NAREA had a membership renewal rate of approximately 94%. . . . In 1988,

> when news of Tobias' certification appeared in many publications around the country and the volume of the complaints we received from our members dramatically increased, our renewal rate dropped to 78% nationwide.

Twichell went on to quantify more specifically the amount of damage attributable to the "cat incident" and stated that "the more than 3000 extra members lost in 1988 would have paid more than $2.1 million in membership dues and $220,000 in profits over the next ten years." Additionally, Twichell stated that NAREA had spent more than $800,000 attempting to repair the damage to its reputation. Significantly, in the deposition testimony he provided in this antitrust suit, Twichell conceded that the "cat incident" continues to damage Petitioners to the present day by causing them to lose members, making it more difficult to attract new members, and damaging the overall credibility of the associations.

In 1990, NAREA initiated a lawsuit against the State of Washington. There, NAREA claimed that Washington's statutory designation of its state-licensed appraisers as "State Certified Real Estate Appraisers" misappropriated NAREA's "Certified Real Estate Appraiser" designation, in which NAREA claimed to have developed common law trademark rights. In an affidavit submitted in that case, Robert Johnson testified that enactment of the legislation and "threatening acts" by the State of Washington had caused NAREA to lose members and to suffer irreparable harm.

There is also evidence that by initiating this lawsuit against Respondents, Petitioners have caused injury to themselves. Petitioners have testified that the adverse publicity surrounding this lawsuit, including publicity of their own making, has had a detrimental impact on NAREA and NARA/MU.

Additionally, Petitioners and their officers have been the target of several government investigations which also have adversely impacted the reputations and membership of the Petitioner associations. In addition to the Federal Election Commission investigation, IAM was the subject of an investigation by the United States Department of Labor. The Department of Labor ultimately sued IAM seeking overtime payments for certain former employees of the Petitioner associations.

In light of the many obvious faults with Petitioners' antitrust case, Respondents jointly filed a motion for summary judgment in the District Court for the District of Minnesota. In this motion, Respondents argued that Petitioners had failed to establish antitrust injury, or anything other than individual injury, as they were required to do under the rule of reason analysis applicable to Petitioners' claim of illegal exclusion from Foundation sponsorship. Respondents also pointed out that Petitioners improperly attributed all of their losses to Respondents, despite the presence of significant other factors that Petitioners admitted caused the injury of which they complained and, therefore, a jury could not make a reasonable and principled determination that the alleged anticompetitive conduct caused Petitioners' injury.

On May 26, 1994, the district court granted summary judgment for Respondents on all counts of Petitioners' complaint. Petitioners appealed this decision to the Eighth Circuit Court of Appeals, which unanimously affirmed all aspects of the district court's decision on August 29, 1995.

REASONS FOR DENYING THE WRIT

Petitioners now ask this Court to review two of the grounds upon which the Eighth Circuit affirmed the district court's grant of summary judgment. First, Petitioners ask this Court to revisit the Eighth Circuit's decision to apply the rule of reason to Petitioners' exclusion from the Foundation. Second, Petitioners challenge the Eighth Circuit's causation analysis. On both issues, Petitioners do not challenge the appellate court's statement of the standard as improper, but instead take issue with the court's application of the standard to the facts of this case.

The Eighth Circuit's decision to apply a rule of reason analysis to facially valid association membership criteria is an unadulterated application of this Court's seminal case on association membership criteria — *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). There is nothing in the Foundation's sponsorship criteria which implicates the *per se* rule and, thus, the court's decision is entirely consistent with Supreme Court precedent.

Similarly, the Eighth Circuit properly stated and applied the applicable standard of causation in this case. The court analyzed the factual evidence to conclude that, in light of numerous other incidents and factors, which Petitioners *concede* caused the injury of which they complain in this case, Petitioners could not and had not established that exclusion from the Foundation was a material cause of their injury. This standard is well established in the case law of this Court and its specific application in this case is consistent with the standard's application in the various circuits that have addressed the issue. *See Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993); *Greater Rockford Energy & Technology, et al. v. Shell Oil*, 998 F.2d 391 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994).

As will be demonstrated below, the Eighth Circuit's opinion does not depart from this Court's holdings, does not create a conflict among the circuits, or present a set of facts the review of which would enhance the jurisprudence on either of these issues. To the contrary, this decision is an unassailable application of the well established Supreme Court and federal circuit precedent on these issues. Consequently, review of this case would require this Court merely to rehash existing precedent and, for that reason, the Court should deny this Petition.

I.

THE EIGHTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED A RULE OF REASON ANALYSIS TO THE FOUNDATION'S SPONSORSHIP CRITERIA.

NAREA and NARA/MU contend that this Court should grant certiorari because the Eighth Circuit's decision to apply the rule of reason analysis to facially valid membership criteria is contrary to this Court's precedent involving challenges to denials of association membership. Petitioners do not take issue with the Eighth Circuit's statement of the law in this area, but claim that its application in this case was in error. As demonstrated below, however, the Eighth Circuit's decision not only properly states the law, but applies it consistently with this Court's precedent and the body of case law which has been developed by the circuit courts relating to this issue.[3]

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3. Petitioners attempt to recast this issue by arguing that the Eighth Circuit improperly determined that the Foundation's sponsorship criteria were in fact reasonable as applied to Petitioners, despite the Respondents having declined to put this question before the court. The court did determine that the Foundation's criteria were *facially valid* in order to conclude that the rule of reason was applicable to this case. The court did not, however, analyze the criteria's specific application in this case as it found that Petitioners' claim was

(Cont'd)

The starting point of the Eighth Circuit's analysis was its recognition, based on the precedent of this Court that:

> associations are free to associate, share information and engage in self regulation. Accordingly, [in analyzing association membership criteria], in the absence of any showing that the challenged practices are anticompetitive on their face, we will apply the rule of reason to determine if there is an antitrust violation.

(Eighth Circuit Opinion at 8; Appendix at 8 (*citing F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986)). Thus, where the purported basis of the criteria at issue appear to serve some legitimate purpose necessary to the proper functioning of the association and overall efficiency of the market, the exclusion is analyzed under the rule of reason to determine whether it impermissibly restricts competition. (Eighth Circuit Opinion at 8; Appendix at 8 (*citing Indiana Federation of Dentists*, 476 U.S. at 458; *Northwest Stationers*, 472 U.S. at 284); *see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Pope v. Mississippi Real Estate Com'n*, 872 F.2d 127 (5th Cir. 1989); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n., Inc.*, 672 F.2d 1280 (7th Cir. 1982).[4]

(Cont'd)

deficient on the element of antitrust injury. Thus, neither the district court nor the Eighth Circuit needed to reach the issue of the reasonableness of the sponsorship criteria.

4. In each of the following cases, the courts applied the rule of reason in analyzing the competitive effect of a professional or trade association rule:

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The appellate court concluded that because membership criteria often promote efficiencies, a rule of reason should be applied to virtually all challenges to association membership criteria "[u]nless the challenged action falls in the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable" and *only* where the alleged boycott "cuts off access to a supply, facility or market necessary to enable the boycotted [associations] to compete." (Eighth Circuit Opinion at 9; Appendix at 9 (*quoting Northwest Stationers*, 472 U.S. at 294)).[5]

Applying the principles set forth in *Indiana Federation of Dentists* and *Northwest Stationers*, the Eighth Circuit correctly found that the Foundation's denial of sponsorship to Petitioners should be analyzed under the rule of reason. As the district court noted, "[p]rofessional associations like the Appraisal Foundation, established to promote professional standards and education, *do not facially appear to restrict competition or decrease output*. Such associations must be able to establish reasonable rules in order to function effectively." (District Court

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(Cont'd)

Majorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary School, Inc., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970); *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); and *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987).

5. This fundamental proposition is not something with which Petitioners disagree. Indeed, Petitioners also cite *Federal Trade Commission v. Indiana Federation of Dentists* and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery Printing Company* for the proposition that a rule of reason analysis is applicable when exclusion from membership appears to serve some legitimate purpose such as promoting the efficiency of the market. (Petition at 10).

Opinion at 13; Appendix at 30 (emphasis added)). Although the court was not required to make such a detailed analysis of the particular criteria at issue to conclude that the rule of reason was applicable, the Eighth Circuit nonetheless focused on the specific criteria at issue and found them to be reasonably related to the legitimate purposes of the Foundation. (Eighth Circuit Opinion at 8-9; Appendix at 8-9). The appellate court noted that the Foundation was created to promote educational and ethical standards for appraisal services and that its membership criteria appeared to be designed to accomplish those goals by requiring that the ethical and technical standards it developed be promoted and taught and by requiring non-profit status for appraisal associations. *Id.* The court reasoned that such requirements are necessary to successful industry self regulation and thus establishing and enforcing such criteria may even serve some pro-competitive purposes by increasing the relative market efficiencies. (Eighth Circuit at 9; Appendix at 9).

The Eighth Circuit also explained why, contrary to Petitioners' position, "this is not a case in which the alleged boycott cuts off access to a supply, facility or market necessary to enable the boycotted [associations] to compete," and, thus, is not a case susceptible to *per se* treatment. The appellate court reasoned that such a position would require it to hold that every appraiser association has an intrinsic and immutable right to sponsorship in the Foundation — not a result Congress intended when it vested the Foundation with the authority to establish standards. (Eighth Circuit Opinion at 9; Appendix at 9). Nor is it a result Congress intended when it expressed its specific disapproval of granting sponsorship to NAREA and its related organizations. Such a holding would defeat the purpose of having the Foundation establish standards and admission criteria. (Eighth Circuit Opinion at 9; Appendix at 9).

In sum, the Eighth Circuit properly stated and applied the

rule of reason to the Foundation's facially valid sponsorship criteria. Petitioners' argument to the contrary is unavailing. Having stated the proper standard and applied the proper analysis, there is no basis for this Court to review the Eighth Circuit's decision.

II.

THE EIGHTH CIRCUIT STATED AND APPLIED THE PROPER CAUSATION STANDARD TO PETITIONERS' CLAIM.

In their second argument to this Court, Petitioners complain that, although the Eighth Circuit properly stated the causation standard applicable to antitrust cases, the court improperly applied that standard. Review of the Eighth Circuit's opinion, however, reveals that its application of the properly stated standard is consistent with the standard's application by the federal courts.

The Eighth Circuit articulated the appropriate causation standard as requiring Petitioners to establish that a reasonable jury could find that the Foundation's exclusionary behavior was a *material cause* of the harm Petitioners claim to have suffered. (Eighth Circuit Opinion at 13; Appendix at 13 (*citing Alexander v. National Farmers Association*, 687 F.2d 1173, 1210 (8th Cir. 1982), *cert. denied*, 461 U.S. 937, 938 (1983)). Petitioners "may not recover for losses due to factors other than the [Foundation's] anticompetitive violations." (Eighth Circuit Opinion at 13; Appendix at 13 (citing *Amerinet*, 972 F.2d at 1494)). As the district court elaborated:

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the

> evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guesswork" not permitted for antitrust jury verdicts.

(District Court Opinion at 17; Appendix at 34 (quoting and citing *Amerinet*, 972 F.2d at 1494; *MCI v. AT&T Co.*, 708 F.2d 1081, 1171 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)). Thus, summary judgment is proper where plaintiffs cannot "distinguish[ ] their alleged antitrust injury from other evidenced injury it sustained." *Amerinet*, 972 F.2d at 1496.

The Eighth Circuit applied this standard to Petitioners' claims and determined that Petitioners improperly attributed all losses to Respondents' allegedly illegal acts, despite the presence of significant other factors causing the same injury. The appellate court painstakingly recounted the "other factors," noting first that the Petitioners have received a great deal of negative attention for maintaining lax membership and certification standards. The Court discussed the case of the *National Association of Real Estate Appraisers, Inc. v. Schaeffer*, CA No. 89-0225T (D.R.I. June 1, 1989), in which NAREA sued Roy Schaeffer for defamation and submitted an affidavit in which it claimed that it had witnessed a dramatic drop in membership renewal rates as a result of the negative publicity surrounding its admission of a cat to its membership ranks.

The negative attention generated by the "cat incident" has not been limited to the appraiser trade. In the course of adopting subsequent amendments to FIRREA, Congress referred to the "cat case," and made clear that it did not intend to suggest that the Foundation open its doors to members such as NAREA and its related associations, precisely because of the finding that they

were nothing more than a diploma mills. H.R. Rep. 101-981, 101st Congress, 2nd Session 1, 7 n. 1 (1990). The Eighth Circuit had "little doubt that the lingering stigma of this incident has contributed greatly to the [Petitioners'] difficulty in attracting and retaining members." (Eighth Circuit Opinion at 14; Appendix at 14).

Petitioners also have blamed the State of Washington for a decrease in their membership. In conjunction with its 1990 suit against the State of Washington, Robert Johnson submitted an affidavit in which he stated that Washington's legislation had caused the Petitioners to lose members. Similarly, in testimony given in this litigation, the Petitioners concede that the current litigation has been a drain on membership strength. (Eighth Circuit Opinion at 14; Appendix at 14).

The Eighth Circuit also took notice that, beyond the litigation instigated by the Petitioners, Johnson and Twichell both had been the targets of investigations and suits by federal agencies. In addition to the Johnson and Twichell guilty pleas relating to the Federal Election Commission investigation into their illegal campaign contributions, the Petitioners defended a suit brought by the Department of Labor for failing to account for over-time pay to certain former employees. (Eighth Circuit Opinion at 15; Appendix at 15).

Finally, the court noted that various other factors have attributed to the decline in membership of these associations. The advent of state certification rendered less essential affiliation with an association and has apparently affected the entire industry. Moreover, several other organizations, which recently were admitted to sponsorship status testified that they had experienced a decline in membership due to the newly-enacted state licensing requirements and added that had they not been admitted to the Foundation, they would actually have more

members because they could then have applied less stringent membership requirements. The court also noted that the impact of the restraint, whatever it may be, could not be adequately determined because the Petitioner associations could participate in the Foundation in another capacity but have chosen not to do so. The overall market for appraisers has declined as well. (Eighth Circuit Opinion at 15-16; Appendix at 15-16).

In applying the causation standard to Petitioners' claim, the Eighth Circuit found that "a number of highly publicized missteps and other considerations have contributed greatly to the Associations' current deflated membership base, so much so that the Associations cannot claim that their exclusion from the Foundation was a substantially contributing factor to their problems." (Eighth Circuit Opinion at 13; Appendix at 13). The Eighth Circuit concluded by noting that:

> the [Petitioner] Associations have blamed everyone but themselves for their current difficulties, but their problems can be traced directly to the corporate office. *We do not require a negation of all possible explanations for the decreased membership*, but in the face of this record, the allegations of conspiratorial harm are too speculative to raise a triable issue. Accordingly, because the Associations have failed to establish the existence of triable fact on the issue of causation, an element essential to their case, the entry of summary judgment in favor of the Foundation is entirely appropriate.

(Eighth Circuit Opinion at 16; Appendix at 16 (emphasis added)).

CONCLUSION

The Eighth Circuit's opinion in this case both properly states and properly applies the well established law applicable to claims of anticompetitive exclusion. Consequently, Petitioners have presented no legitimate basis for this Court to review the two issues raised in their Petition. Respondents therefore request that this Court deny NARA/MU and NAREA's Petition.

Respectfully submitted,

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